Lenora J. Pernell v. U.S. General Accounting Office

Docket No. 01-03

Date of Decision: March 13, 2003

Cite as: Pernell v. GAO (3/13/03)

Before: Michael W. Doheny, Member, for the Board; Anne M. Wagner, Vice-Chair; Jeffrey S. Gulin, Chair

Retaliation

Discrimination

Prohibited personnel action

Denial of within-grade increase

Removal

Jurisdiction of PAB

DECISION ON PETITIONER'S APPEAL FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

This matter is before the Personnel Appeals Board (PAB or the Board) on appeal of Lenora Pernell (Appellant) from the Administrative Judge's August 15, 2002 Decision in which he sustained the Agency's action removing her from employment at the General Accounting Office (GAO or Agency); denied review of two within-grade increase (WIGI) denials for lack of jurisdiction; and found that she had failed to prove allegations of prohibited personnel practices, retaliation or discrimination in the removal action and with respect to ratings of her performance by her supervisors.

The Appellant challenges all of the Administrative Judge's holdings except for his decision to expunge her May 1999 performance appraisal. For the reasons discussed below, the Initial Decision is affirmed.

I. Factual Background

The facts of this case, set forth by the Administrative Judge (AJ) in greater detail in the Initial Decision, are summarized as follows:

Appellant began her employment at GAO in 1984 as a GS-4 program aide in the Resources, Community and Economic Development Division (RCED) and remained a member of the Administrative, Professional and Support Staff (APSS) throughout her tenure at GAO. Transcript (Tr.) 1787. In 1998, Appellant was employed as a GS-7 Issue Area Support Technician in the Government-wide Accounting and Financial Management (GAFM) issue area of the Accounting and Information Management Division (AIMD). Tr. 52-53, 107-08. Appellant's responsibilities consisted of such duties as answering telephones, completing time and attendance (T&A) forms and travel orders, typing and finalizing memoranda, ordering supplies and delivering mail. Tr. 1778-79, 2083-84. She had performed these and similar duties in other GAO units. Tr. 1789-90, 2078, 2084, 2088.

In the Spring of 1998, Appellant's issue area directors, Greg Kutz and Gary Engel, contacted Sarah Jaggar, the Director of Operations for AIMD, to inform her that they were concerned about Appellant's performance and attendance. Tr. 47, 53-54. They asked Ms. Jaggar to reassign Appellant to another office. Tr. 64. After several months of unsuccessfully attempting to arrange a detail outside Appellant's division, Ms. Jaggar offered Appellant a position in AIMD's Planning and Reporting Office under the supervision of Anthony Salvameni. When she learned that the position consisted mainly of processing T&A reports, Appellant told Ms. Jaggar that she did not want that assignment and "would not go there." Tr. 66, 334, 1791.

Appellant then contacted John Luke, Deputy Assistant Comptroller General for Human Resources, who oversaw personnel related matters in GAO. She told Mr. Luke that she did not want the assignment, that two other employees who were white females had declined the job, and that she would prefer another assignment. Tr. 405, 1792-95. Mr. Luke contacted Ms. Jaggar on Appellant's behalf and asked whether she would consider other options for Appellant. Tr. 66-67, 408-09. Ms. Jaggar agreed to seek another position for Appellant despite having previously looked within the Division without success. Tr. 64-65, 78, 336, 372-73, 409.

Because other efforts on behalf of Appellant were unsuccessful, Ms. Jaggar decided to place Appellant on detail to the AIMD Computer Support Group (CSG), which reported directly to her. Tr. 78-81. Appellant worked under the supervision of James Bouck, manager of CSG, and Ms. Jaggar, a member of the Senior Executive Service, was the second-line supervisor. Tr. 82, 112.

Although the detail was to a position of "unclassified duties," Ms. Jaggar determined that there was an "exact match" of the needs of CSG and Appellant's position as Issue Area Support Technician. Tr. 85. Appellant was expected to maintain an inventory of AIMD computer equipment and provide support to staff throughout the division. Tr. 81-88.

Before the detail began, Mr. Bouck met with Appellant to review the work that she would be doing. Tr. 1022, 1799. Appellant expressed no reservations about the job and indicated that she was happy to be back in the computer field. Tr. 1032, 1435, 1799. After the detail began on January 27, 1999, Ms. Jaggar and Mr. Bouck had continuous, frequent involvement with Appellant. Mr. Bouck met with her almost daily and Ms. Jaggar, Mr. Bouck and Appellant met on Tuesday afternoons to go over the tasks, progress and problems. Tr. 126, 134.

Within a short period after the detail had begun, Ms. Jaggar and Mr. Bouck began to observe problems with Appellant's work. Tr. 127-28. Supervision became more intense and communication and counseling increased. Tr. 134-35, 1101, 1845, 2085-86; R.Ex. 21. Throughout April and early May 1999, Appellant continued to have problems with the timeliness of her assignments as well as with the accuracy and completeness of the information she was collecting. Tr. 1062-63, 1102, 1108, 1116, 1130-31, 1133; R.Exs. 21, 24.

Late in April 1999, the AIMD Personnel Specialist informed Ms. Jaggar that a determination needed to be made about whether to grant Appellant a within-grade increase. Tr.135. Ms. Jaggar and Mr. Bouck met and concluded that her performance in CSG was not at an acceptable level to warrant a within-grade increase. Tr. 136-37; R.Ex. 25. On May 21, 1999, Ms. Jaggar presented Appellant with a letter advising her that because her performance as documented in the most recently completed annual performance appraisal[1] was not at an acceptable level of competence, the scheduled within-grade increase was denied. Appellant was advised of her right to request reconsideration. R.Ex. 31.

Ms. Jaggar and Mr. Bouck prepared a performance appraisal for Appellant covering the period of the detail in CSG. Tr. 142; R.Ex. 6. Appellant's performance was determined to be unacceptable in two dimensions–"Individual Work Productivity" and "Checking, Examining and Recording." Tr. 145-46; R.Ex. 6.

On June 1, 1999, Petitioner filed a charge with the Personnel Appeals Board Office of General Counsel (PAB/OGC) claiming that the May 1999 appraisal and the denial of the within-grade increase were taken in violation of law, rule or regulation and constituted reprisal for the exercise of appeal rights. Tr. 1889-90; P.Ex. 16.

On June 4, 1999, Appellant was placed in a performance improvement opportunity period of 45 days. Tr. 147, 150; R.Ex. 38. During the opportunity period, Mr. Bouck reviewed Appellant's work products on a daily basis. Tr. 1304. The supervisors reviewed her progress at weekly meetings, noting her progress, identifying problems and counseling her. Tr. 159-61, 1259-61; R.Ex. 103. Despite the extensive counseling, assistance and feedback, much of her work continued to be unacceptable in the opinions of her supervisors. Tr. 163, 1304-05; R.Exs. 47, 49, 52, 103.

On September 15, 1999, Appellant was given a performance appraisal, prepared by Mr. Bouck and signed by Ms. Jaggar, that covered the opportunity period. Appellant's performance was rated unacceptable in the dimension of "Checking, Examining and Recording." Tr. 184-85, 1376, 1940-41; R.Ex.7.

On October 8, 1999, Appellant amended her June 1, 1999 charge filed with the PAB/OGC to include her September 1999 performance appraisal that she claimed was a retaliatory action for the exercise of her appeal rights. Tr. 2075-76; P.Ex. 26; PfR ¶49.

[1] Appellant's most recently completed "annual" performance appraisal was for the period of October 1997 to September 30, 1998 wherein she was rated "needs improvement" in two job dimensions. Although Appellant claims it was only a partial—not an annual—rating, our review of the rating (R.Ex. 133) confirms that it was, in fact, an annual rating.

Following Appellant's opportunity period in CSG, Mr. Jeffrey Steinhoff, AIMD Managing Director, after consultation with Mr. Luke and Ms. Jaggar, decided to reassign Appellant to an Issue Area Support Technician position. Tr. 190. On November 15, 1999, Appellant was assigned to the Audit, Oversight and Liaison Division (AOL) under the direction of David Clark, a member of the Senior Executive Service. Tr. 191-92, 441; R.Ex. 8. Appellant was placed under the direct supervision of Cynthia Cortese, a GS-10 Issue Area Assistant. Tr. 190-92. On November 17, 1999, Ms. Cortese and Appellant met and the duties of the position were discussed. Tr. 571-72. A copy of the job description and dimensions were provided to Appellant and she was invited to review them and suggest any changes. Tr. 445-50, 454, 571-74, 827-28. Appellant and Ms. Cortese signed the form. Tr. 582; R.Ex. 60.

Ms. Cortese had almost daily communication with Appellant at which time Appellant's tasks and performance were discussed. Tr. 586-87. Nevertheless, Ms. Cortese noted problems with several of Appellant's routine assignments including failure to distribute mail on more than one occasion, despite daily reminders; failure to send work papers to the Federal Records Center in a timely manner; and failure to create time card files. Tr. 574-75, 583-84, 589-94, 606. Appellant's performance problems continued through the Winter and Spring of 2000. Tr. 612-616, 619-20, 633-34.

New Agency-wide performance standards were issued and expectations were reset for all APSS staff in February 2000. Tr. 454, 621-22. On February 24, 2000, Appellant met with Mr. Clark, who gave her the expectations. Tr. 624. Appellant then met with Ms. Cortese to discuss the new standards, which had been selected by Ms. Cortese and reviewed by Mr. Clark. Tr. 626-27, 630-31. Appellant and Ms. Cortese initialed the expectation form. Appellant had no questions about the revised expectations. Tr. 629, 897-98, 1982, 2095; R.Ex.63.

In May 2000, Ms. Jaggar was again notified that Appellant was eligible for a within-grade increase. Tr. 192. Based on discussions with Mr. Clark and Ms. Cortese, Ms. Jaggar denied the within-grade increase. Tr. 193. Appellant was notified of the decision and of her right to request reconsideration by letter dated June 2, 2000. Tr. 193; R.Ex. 71.

In addition, Mr. Clark and Ms. Cortese prepared an interim performance appraisal for Appellant covering the period from November 15, 1999 through May 31, 2000. Appellant was given unacceptable ratings in three dimensions: "Individual Work Productivity;" "Handling and Processing Materials and Mail;" and "Checking, Examining and Recording." R.Ex. 8 at 3.

On June 30, 2000, Appellant further amended her June 1, 1999 charge claiming the denial of the within-grade increase and the negative performance appraisal involved retaliation. P.Ex. 49. She also filed a discrimination complaint with GAO's Civil Rights Office (now the Office of Opportunity and Inclusiveness). P.Ex. 51.

As a result of her June 2000 performance appraisal, Appellant was placed in an opportunity period in AOL that ran from June 28 to September 15, 2000.[2] On June 28 Appellant received a letter informing her of the opportunity period and of the specific dimensions and standards that pertained to her tasks. The letter further described training opportunities that were offered during this period. Tr. 502; R.Ex. 78. These matters were also discussed at length in a meeting on the same day between Appellant, Mr. Clark and Ms. Jaggar. Tr. 199-200, 502-03, 2089-91; R.Ex. 79. Ms. Cortese met regularly and frequently with Appellant at which time Ms. Cortese repeatedly pointed out errors in her work and that her work was not being completed on time. Tr. 734-61. Ms. Cortese explained that she was taking the errors into consideration for rating purposes. Tr. 761. Despite the feedback, counseling and training, Appellant's work remained unacceptable in the dimension of "Checking, Examining and Recording." At the end of her opportunity period, Appellant received an unacceptable performance rating in that dimension. Tr. 204-05, 516; R.Ex. 9.

On the basis of Appellant's opportunity period rating, Ms. Jaggar proposed Appellant's removal for unacceptable performance by notice dated October 25, 2000. R.Ex. 87. The proposal notice set forth the reasons for the proposed action and advised Appellant of the opportunity to reply orally and in writing.

Mr. Steinhoff, the deciding official, reviewed the proposal to remove and Appellant's November 14, 2000 written response. Tr. 1686-92; R.Ex. 88. After analyzing the concerns raised by Appellant, Mr. Steinhoff conducted an inquiry into the circumstances and events preceding the proposal. Tr. 1700-33. Satisfied that the proposed action was proper and based solely on perceived performance deficiencies, Mr. Steinhoff notified Appellant of his decision to remove her on December 13, 2000. Tr. 1720; R.Ex. 97. After reviewing a subsequent submission from Appellant, he reiterated his conclusion on December 21, 2000. Tr. 1734; R.Ex. 99. The removal was effected on May 23, 2001.

II. Initial Decision

In her Petition for Review, Appellant alleged that the following personnel actions were taken in retaliation for the assertion of protected appeal rights in violation of 5 U.S.C. §2302(b)(9)(A) and because of her race (African-American) in violation of 42 U.S.C. §2000e-16 and 5 U.S.C. §2302(b)(1)(A):

1) the May 5, 1999 denial of a within-grade increase;

2) the unacceptable ratings she received in two dimensions of her May 20, 1999 performance appraisal;

3) the unacceptable rating she received in one dimension of her September 14, 1999 performance appraisal;

[2] The opportunity period was originally scheduled from June 28, 2000 to August 14, 2000 but was extended until September 15, 2000 because of a medical condition of Appellant and leave schedules of the supervisors. Tr. 2052; R.Exs. 9, 82.

4) the unacceptable ratings she received in three dimensions of her June 1, 2000 performance appraisal;

5) the June 2000 denial of a within-grade increase;

6) the unacceptable rating she received in one dimension of her October 5, 2000 performance appraisal; and

7) the removal from GAO employment based on unacceptable performance, effective May 23, 2001.

The AJ conducted a nine-day hearing into these matters on June 11-15 and June 18-21, 2001. Upon consideration of the record of the hearing, Appellant's and Respondent's post-hearing briefs and Appellant's and Respondent's reply briefs, he issued a decision dated August 15, 2002.

The AJ set forth detailed findings from the testimonies of witnesses—including especially, Mr. Clark, Ms. Cortese and Appellant—and from the documentary evidence of Appellant's work products and found that the Agency had met its burden of proving by substantial evidence, that Appellant's performance in the dimension of "Checking, Examining and Recording" was "unacceptable" as described for that element in the APSS Manual.[3] On the basis of his finding, the AJ sustained the removal of Appellant based on unacceptable performance. Initial Decision (Decision) at 30-33.

The AJ then turned to the question of the Board's jurisdiction to consider the May 1999 and June 2000 denials of within-grade increases where Appellant failed to seek reconsideration of the decisions as provided for in GAO Order 2531.3, ch.4. The AJ analyzed Appellant's claims challelnging the denials of WIGIs under the Federal Circuit's decision in *Goines v. MSPB*, 258 F.3d 1289 (Fed. Cir. 2001), which discussed the same issue as it applies to executive branch employees covered by 5 U.S.C. §5335(c) and implementing regulations at 5 C.F.R. §531.410. In

[3] The APSS Manual defines "unacceptable" performance in the dimension of "Checking, Examining and Recording" as follows:
Frequently:

- Overlooks or misses errors, even when there is little time pressure; forwards or processes inaccurate forms, records, documents, etc.
- Completes forms slowly or carelessly; selects an inappropriate form for the situation; does not double-check work; overlooks important information on paperwork; fails to respond to forms, orders, or advances that require immediate attention.
- Omits appropriate or obtains inappropriate information, signatures or approvals; forwards materials without verifying that critical information is present or accurate.
- Fails to take action to correct errors or problems; corrects errors only in the material at hand, making no attempt to correct the problem in other areas that may also be affected.
- Allows logs, records or files to become outdated, making retrieval and tracking of information difficult or impossible; fails to note important change-of-status information.
- Makes computation errors and fails to catch these mistakes; does not question or notice figures that "look wrong." R.Ex. 5 at 46.

Goines, the Court upheld the practice of the Merit Systems Protection Board to deny jurisdiction over appeals from denial of within-grade increases where reconsideration had not been requested, because the regulation links appeal rights to receipt of a reconsideration decision. 258 F.3d at 1992-93. Because the GAO Order contains comparable language which also provides only for an appeal from a reconsideration decision, the AJ found that Appellant did not timely request reconsideration of the denials of her within-grade increases and consequently had failed to exhaust her administrative remedies. Accordingly, the AJ found that the PAB has no jurisdiction to hear her appeals. Decision at 34-36.

The AJ reviewed the procedures leading to the May 1999 performance appraisal and found that because the Agency had not communicated the dimensions and expectations of the detail position until she was given the appraisal, the Agency had failed to comply with its regulations and he ordered the May 1999 appraisal expunged. Decision at 38. The AJ found that the defective appraisal had no affect on other issues of the case because other issues over which the Board has jurisdiction were not based on this performance appraisal. Decision at 38 n.25.

The AJ found, however, that the Agency had complied with GAO regulations in rendering the September 1999 performance appraisal and that Appellant had not proven that the Agency had committed prohibited personnel practices in that appraisal decision. Decision at 38-40.

Similarly, the AJ found substantial evidence that the Agency had effectively communicated expectations to Appellant at the outset of her reassignment to AOL and throughout the months leading to the June 2000 performance appraisal. The expectations, he found, were communicated to Appellant through meetings, regular feedback and counseling. Accordingly, he found that the Agency did not engage in a prohibited personnel practice when it rated Appellant's performance as unacceptable in two dimensions in its June 2000 appraisal. Decision at 40-43.

The AJ also considered Appellant's allegation that she was held to absolute standards in effecting the appraisal and the removal action. Noting that a rating of "unacceptable" requires "frequent" infractions from the standards and that the appraisals and specifications in support of the removal action, as well as the evidence presented at the hearing in support of the actions, reflected "over 100 examples of errors made by the Appellant before and during the opportunity period," the AJ found that the Appellant had failed to show by a preponderance of evidence that the Agency engaged in a prohibited personnel practice by using absolute measures to rate her performance as unacceptable. Decision at 43-45.

In analyzing the Appellant's allegations with respect to the October 2000 performance appraisal, which followed the opportunity period and formed the basis for the removal action, the AJ considered several arguments advanced by Appellant. He found substantial evidence that the Agency had provided Appellant with a meaningful opportunity to improve as required by law. He found the feedback and mentoring received by the Appellant from her supervisors were adequate. Decision at 45-47. Training opportunities were offered and provided, but Appellant chose not to avail herself of opportunities offered to her. Decision at 48-49. The AJ dismissed Appellant's allegation that her duties were expanded during the opportunity period. Finding that all duties assigned to her were commensurate with the duties and responsibilities listed in the

position description for Issue Area Support Technicians, the AJ found that the assigned duties did not deprive Appellant of a meaningful opportunity to improve and that Appellant had failed to show that the Agency had committed a prohibited personnel practice by assigning her expanded duties.

Appellant alleged retaliation for protected activity with respect to all actions in this case. The AJ found that prior to the May 1999 appraisal and denial of within-grade increase, Appellant had not met a prerequisite of having engaged in protected activity. He rejected her argument that eliciting Mr. Luke's assistance in finding an alternative to assignment to AIMD's Planning and Reporting Office constituted protected activity. Because neither Appellant nor Mr. Luke had made any mention of pursuing the EEO process in their testimonies about this contact and because the circumstances and content of Mr. Luke's intervention contained no indication that it was made in connection with the EEO complaint processes, the AJ found that the eliciting of Mr. Luke's assistance was not an activity protected by EEO statutes. Decision at 52.

Appellant's first protected action was the filing of a charge with the PAB/OGC in June 1999. The AJ found, however, that the "well-documented ongoing performance deficiencies amply negate the allegation of retaliatory motive" with respect to events occurring subsequent to the filing of that charge. Decision at 53.

The Appellant alleged all of the actions at issue were discriminatory because of her race (African-American). Her first contact with the EEO counselor did not occur until March 5, 2000 and her EEO complaint was not filed until July 10, 2000. R.Ex. 66. Because timely submission of the issues to the Civil Rights Office is a prerequisite to bringing a discrimination claim to the PAB, the AJ determined that Appellant's allegation of discrimination was time barred as to all actions except the June 2000 denial of within-grade increase and performance appraisal, the October 2000 performance appraisal and the removal. The AJ then found that Appellant failed to show that she was similarly situated to an individual who was not a member of her protected class and that she was treated more harshly than that individual. Moreover, he found, she did not rebut the Agency's evidence of unacceptable performance to show that its actions were pretext for discrimination. Decision at 55-57.

III. Analysis

The Board's regulations provide that on appeal the full Board may review the record *de novo.* 4 C.F.R. §28.87(g). However the Board will not ordinarily overturn a finding of fact in the initial decision "unless that finding is unsupported by substantial evidence in the record viewed as a whole." *Id.* The Board will also consider whether new and material evidence is available; or whether the initial decision is based on erroneous interpretation of statute or regulation; or whether the initial decision is arbitrary, capricious or an abuse of discretion or otherwise not consistent with law; or the decision is not made consistent with required procedures and results in harmful error. *Id*.

A. Removal Action

Appellant alleges that the AJ erred in making findings on the merits of the removal action before analyzing her allegations of prohibited personnel practices with respect to the appraisal, the opportunity period and the removal action. Appellant contends that the AJ committed reversible error because he sustained the removal based on a finding that the Agency showed, by substantial evidence, that Appellant's performance was unacceptable during the period June through September 2000 and considered her affirmative defenses including various alleged prohibited personnel practices (failure to communicate performance standards, failure to be given an opportunity to improve, etc.) after making his findings on the ultimate determination. Appellant argues that the order of consideration creates, in effect, a lesser burden of proof for the Agency in removal cases. Appellant's Brief (App.Br.) at 3. Appellant further argues that:

> [t]he fact that the Administrative Judge later determined that the Petitioner was provided standards and given a meaningful opportunity to improve her performance during the June through September opportunity period does not cure this defect. The decision clearly makes a determination as to the validity of the removal BEFORE it even addresses these matters.

App.Br. at 3-4 (emphasis in original).

The Board's decision in *Poole v. GAO* sets out in very clear terms what the Agency must do prior to removing an employee for unacceptable performance. The employee must have been rated below the "acceptable" level in at least one critical job element; the employee must have been given a meaningful and reasonable opportunity period in which to demonstrate "acceptable" performance; and the employee must have received an unacceptable rating for the opportunity period in at least one critical dimension. *Poole v. GAO*, PAB Docket No. 98-01, slip op. at 19 (June 30, 1999), *aff'd en banc,* Mar. 17, 2000, *aff'd* No. 00-6003 (Fed. Cir. 2001) (unpublished). *Poole* sets forth the logical order of events in effecting a removal action pursuant to GAO Order 2432.1. It is not, however, a prescription for the order of the AJ's analysis.

The Agency's burden of proof in performance-based actions is to show by substantial evidence that after providing a reasonable opportunity to Appellant to demonstrate acceptable improvement, the Appellant continued to perform unacceptably. 4 C.F.R. §28.61(a)(1); *see Hazzard v. Department of the Navy*, 24 MSPR 593 (1984). The Appellant has the burden when alleging that the Agency committed a prohibited personnel practice to prove the prohibited personnel practice by a preponderance of the evidence. 4 C.F.R. §28.61(c); 5 C.F.R. §1201.56(a)(2); *see Anderson v. Department of Agriculture*, 9 MSPR 536 (1982).

In all of the actions at issue, the Appellant contends that the Agency violated 5 U.S.C. §2302(b)(12), which provides that it is a prohibited personnel practice to "take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title."

The record is clear that the Appellant was given a performance rating in June 2000 that rated her "unacceptable" in three dimensions and that she was given an opportunity period of 45 days

(extended by 30 days) in which to demonstrate acceptable performance. There is substantial testimonial and documentary evidence that her performance in the dimension of "Checking, Examining and Recording" was "unacceptable" as described by the standards. The AJ found:

> The Agency presented varied examples of Petitioner's work to show that she consistently made errors as described in the critical element. R.Exs. 120, 122. Petitioner failed to reconcile discrepancies between employee time sheets and GAO's computerized records of leave balances. Tr. 782-91, 789; R.Ex. 122E. She frequently used wrong transaction codes, and charged leave balances and job codes inaccurately. Tr. 781-816; R.Exs. 120E, 122C. The travel orders that Petitioner prepared often included incorrect itineraries. R.Exs. 120B, 122B. They also omitted or included incorrect pertinent personal information about the traveler and amounts to be charged. Tr. 636, 777-80. The Agency provided over 100 documents with errors which showed that she did not double check her work, that she overlooked important information on paperwork, that she omitted information and forwarded documents without verifying that critical information was correct, that she failed to take action to correct errors or problems, that she made no attempt to correct problems affecting other areas, that she made computation errors and did not question or notice figures that "look[ed] wrong."

Decision at 31.

We affirm the AJ's decision finding the Agency had met its burden of showing unacceptable performance during the opportunity period by substantial evidence.

B. Prohibited Personnel Practices

Turning now to Appellant's allegations that the Agency's removal action should not be sustained because it was a prohibited personnel practice, involving retaliation for protected activity and/or discrimination on account of race, we find the Appellant has failed to prove her affirmative defenses by a preponderance of evidence.

Appellant alleges that she was not informed of the standards at the beginning of her assignment to AOL as provided for by GAO Order 2531.3, ch.3 ¶2, and that the earliest date on which she received written notice of her expectations was in February 2000, when she met with Ms. Cortese to discuss the expectations set forth in the new edition of the APSS Manual. She also contends that her supervisors failed to tell her why her work products were unacceptable and did not tell her what she needed to do to be rated at the acceptable level. She takes exception to the AJ's rejection of her arguments and particularly with his application of the harmful error rule.

The MSPB has found that sufficiency of notice is determined by what the employee knew as evidenced by meetings with him or her to discuss deficiencies. *Coleman v. Army*, 27 MSPR 305,

309 (1985).[4] Another MSPB case states that notice in the form of counseling sessions is sufficient absent a showing of harmful error, even if an agency does not follow its own regulation requiring a specific written notice of poor performance. *Ketchum v. FAA*, 28 MSPR 268, 271, *aff'd mem.,* 785 F.2d 325 (Fed. Cir. 1985). Further, the MSPB has also held that a written notice of deficiencies, or improvement period, need not be particularly elaborate. *Bare v. DHHS*, 30 MSPR 684, 686 (1986). The MPSB has also sustained an agency's disciplinary action where an employee claimed that he was never told what the minimum acceptable standard was and he had been performing under the same standard for five years and there was no record to indicate that he advised anyone that he did not understand what was required of him to raise his performance. *O'Hearn v. GSA*, 41 MSPR 280, 283-84 (1989), *aff'd,* 902 F.2d 44 (Fed. Cir. 1990) (unpublished).

The AJ's findings, that the Appellant had met with the supervisors at the outset of her employment in AOL and that throughout her employment there she had received information on her dimensions and expectations, are supported by substantial evidence. In any case, as Appellant concedes, her supervisors communicated her performance standards in February 2000 after the Agency distributed a new APSS Manual. Furthermore, as the AJ found, the supervisors had spent "an inordinate amount of time" counseling Appellant about her work assignments. *See Coleman v. Army,* 27 MSPR 305.

Appellant contends that during the opportunity period she was denied a meaningful opportunity to demonstrate acceptable performance because the supervisors did not "tell . . . [her] why her work products did not meet the performance standards for her job dimensions." App.Br. at 19. Appellant argues that simply pointing out errors does not constitute adequate or meaningful feedback about how her job performance failed to meet the standard in question.

The AJ held otherwise, relying on *Martin v. Department of Transportation,* 795 F.2d 995 (Fed. Cir. 1986). In *Martin* the Court rejected a contention similar to that of Appellant, noting that he had had years of prior experience; was given on-the-job training; and had attended formal training or was given the opportunity to attend. *Id*. at 998. In that case, the agency, though it provided Martin with appraisals during the appraisal period, had failed to document appraisals as provided for by the agency's Orders. The Court stated that Martin had failed to show harmful error resulted from the agency's failure to properly document its appraisals of appellant's performance. *Id.* at 999.

Here, where for several years prior to the removal action the Appellant held jobs in which she performed duties and responsibilities of a nature similar to the position from which she was removed; where she received performance appraisals that cited, *inter alia,* numerous errors of omission and commission in the dimension of "Checking, Examining and Reporting" as a basis for appraising her performance as "unacceptable" in that dimension; where she had been

[4] As these cases and the several cases cited by the AJ illustrate, while affording an employee a reasonable opportunity to demonstrate satisfactory performance is a substantive right and notice of expectations is an element of that right, the manner and timing of notice of expectations are procedural and thus, subject to a requirement of Appellant to show harmful error. *Harmful error* is defined as error by the Agency in the application of its procedures, which, in the absence or cure of the error, might have caused the Agency to reach a conclusion different than the one reached. 4 C.F.R. §28.61(d).

informed of a standard that defines unacceptable performance, in part, as "frequently [o]verlooks or misses errors even when there is little time pressure; forwards or processes inaccurate forms, records, documents, etc.;" where she was given well over 45 days in which to demonstrate acceptable performance; where training was offered but not accepted; and where over 100 errors, inaccuracies, etc. were pointed out during the opportunity period, we find that the Appellant was given adequate notice of her performance deficiencies, assistance and a reasonable opportunity for her to demonstrate acceptable performance, and adequate feedback during the opportunity period. Appellant, therefore, has failed to show that the Agency violated a GAO Order that directly concerns a merit system principle.

C. Absolute Standard

Appellant's continuing allegation that she was held to an "absolute standard"[5] is baseless. As the AJ found, the standard describes unacceptable performance as "frequently overlooks or misses errors, . . ." the notice of proposed removal cites to numerous errors, and the evidence presented by GAO to support its action shows many errors. Because Appellant's removal was not based on a single instance of poor performance, Appellant's contention that Ms. Cortese has a low tolerance for errors is not germane.

D. Retaliation and Discrimination

To prevail on an allegation of illegal retaliation, either for the protected activity of filing charges with the PAB/OGC or the EEO complaint, Appellant must demonstrate by a preponderance of the evidence that (1) she engaged in protected activity; (2) she was subsequently treated adversely; (3) the accused individual knew of the protected activity; and (4) there is a genuine nexus between the protected activity and the personnel action. *See Warren v. Department of the Army,* 804 F.2d 654, 656-58 (Fed. Cir. 1986); *McMillan v. Department of the Army*, 84 MSPR 476, 483 (1999); *Jaramillo v. Department of the Army,* 81 MSPR 469, ¶27 (1999); *Malphurs v. GAO*, 2 PAB 147, 150 (1992). As to the last factor, a successful claimant must establish that the protected activity was a "significant factor" in the personnel decision at issue. *Special Counsel v. Costello,* 75 MSPR 562, 610 (1997).

On review of the record, we concur with the AJ that Appellant had not engaged in protected activity until she filed the charge in June 1999; that there was, therefore, no causal connection between the filing of the charge on matters occurring prior to June 1999; and that "[a]s to the subsequent actions, Petitioner's pre-existing performance difficulty and well-documented ongoing performance deficiencies amply negate the allegation of retaliatory motive." Decision at 53. Although Appellant argues that there is a causal connection between the actions taken against her and the protected activities, she does not cite to any evidence and the record is devoid of any evidence that would show a connection.

Appellant's allegation of discrimination on account of race is similarly unsupported. To establish a *prima facie* case of discrimination, Appellant must demonstrate that she is a member of a protected class, that she was similarly situated to an individual who was not a member of her

[5] "Absolute standard" is one that allows a rating of "unacceptable" on a job element for a single instance of poor performance. *See Blain v. Veterans Administration*, 36 MSPR 322, 325 (1988).

protected class and that she was treated more harshly than that individual. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Appellant alleged discrimination with respect to all actions that form the bases for her Petition to the Board. The Board agrees with the AJ's determination that because Appellant did not contact an EEO Counselor until March 5, 2000 and did not file a formal complaint until July 10, 2000, she was untimely under GAO Order 2713.2 with respect to actions prior to the June 2000 denial of within-grade increase.[6] The Board also agrees with the AJ's decision that because Appellant failed to show that she was similarly situated to an individual who was not a member of her protected class and that she was treated more harshly than that individual she had failed to establish *prima facie* evidence of discrimination. Moreover, as the AJ found, the Agency proffered a legitimate non-discriminatory reason for the actions—her unacceptable performance—that Appellant had not rebutted.

Although Appellant argues that the AJ erred because the courts have found other evidence can be substituted for comparative treatment, she merely points to her contention that the Agency "committed harmful procedural, as well as substantive, errors in taking these actions," to support her claim. App.Br. at 25.

E. PAB Jurisdiction of Denials of WIGIs

Appellant argues that the AJ erred in concluding that the PAB has no jurisdiction over the May 1999 and June 2000 denials of within-grade increase. App.Br. at 4. Appellant claims that the AJ failed to consider the Board's statutory jurisdiction to hear appeals of personnel actions that constitute prohibited personnel practices.

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[6] Appellant further argues that the cases do not support the AJ's conclusion that Appellant's contact with Mr. Luke was not a protected activity. App.Br. at 21. Appellant references *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 682 F.2d 1149 (9th Cir. 1982), and argues that a threat to file a complaint is also deemed to be protected activity. However, there is no evidence that Appellant ever threatened to file a complaint. Similarly, Appellant also references *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997), *cert. denied,* 523 U.S. 1122 (1998), and states that "an employee engaged in 'protected activity' when she contacted an EEO counselor." However, in this case, Appellant is claiming that her protected activity was a meeting with John Luke, Deputy Assistant Comptroller General for Human Resources, not an EEO counselor. In order for the action to be protected activity, Appellant must have initiated the EEO complaint process. The difference between the cases cited by Appellant and the instant case is that in those cases there was an assumption that there was an issue of discrimination because the employees went to an EEO counselor or raised issues of possible discrimination. In the current case, the evidence shows that Appellant did not raise an issue of discrimination in her meeting with Mr. Luke. As the AJ found, Mr. Luke credibly testified that he was not aware that Appellant had a complaint of discrimination. Decision at 52 n.35. Mr. Luke specifically stated that he did not recall that she raised discrimination and was confident that there was no discussion of a claim of racial discrimination. Tr. 402-07, 419. Thus, while contact with an individual in Mr. Luke's position could have begun the EEO process, Petitioner did not establish that such contact did so in this case.

In reaching his decision, the AJ relied, in part, on *Goines v. MSPB*, 258 F.3d 1289 (Fed. Cir. 2001). Decision at 35. In *Goines*, an executive agency employee had not requested reconsideration of the denial of a within-grade increase as required by the agency regulations and as a result the MSPB had concluded that it had no jurisdiction over an appeal of the decision to deny the within-grade increase. The Court, noting that the statute did not explicitly require reconsideration as a prerequisite to an appeal, found that such a requirement is a reasonable implication of the statutory scheme.

Appellant attempts to distinguish *Goines* by stating that the MSPB has jurisdiction over specific types of appeals and its jurisdiction is more limited than the PAB's jurisdiction. App.Br. at 5-6. Appellant further alleges that neither 31 U.S.C. §735 nor 4 C.F.R. §28.2 limit the PAB's authority to hear employee appeals involving WIGI decisions, while the MSPB's jurisdiction is limited by 5 C.F.R. §1201.1 to specific types of employee appeals. Appellant also states that the "statutory scheme of the PAB and the reasonable implication of that scheme do not compel a conclusion that a reconsideration decision is a condition precedent to a GAO employee's appeal of a WIGI denial to the PAB." Brief at 5-6.

The Board affirms the AJ's conclusions and holding. As Appellant points out, there is no explicit statutory grant of appeal to GAO employees when within-grade increases are denied. The statute provides, however, that the Comptroller General must establish a personnel management system that provides, *inter alia*, "a procedure for processing complaints and grievances not otherwise provided for under [other clauses]." 31 U.S.C. §732(d)(5). Thus, the jurisdiction of the PAB to entertain allegations regarding denial of within-grade increases is derived from GAO Order 2531.3. The Order clearly provides that an employee may seek reconsideration of a decision to deny a WIGI and provides for an appeal only from a reconsideration decision. Order 2531.3 ch.4 ¶10. Further indication that the GAO intended to limit appeals from WIGI denials is found in the Order at chapter 4, ¶7.b, which provides that there is no appeal from a decision on whether an employee, by not cooperating, is deemed to have withdrawn a reconsideration request. It is clear, therefore, that there is no right of appeal from a denial of WIGI without first seeking reconsideration. The Board also notes, as did the Court in *Goines,* that a salutary purpose of the requirement is to give the Agency an opportunity to correct, at a higher level, mistakes that have been made in denying within-grade increases often at a lower level. *Goines*, 258 F.3d at 1292.

Appellant argues that, pursuant to 4 C.F.R. §28.2(b)(2), the Board has jurisdiction over an action brought by an employee over a prohibited personnel practice, and, because she filed a timely charge with the PAB/OGC alleging a prohibited personnel practice, the Board has jurisdiction over the denial as an individual right of action (IRA). She argues that the right would be comparable to an employee's right to an IRA before the MSPB[7] [8] when the employee first raises the matter with the Office of Special Counsel.

[7] The MSPB has jurisdiction over a type of complaint, known as "individual right of action" (IRA) under the Whistleblower Protection Act of 1989, as amended, 5 U.S.C. §1221, on matters not otherwise appealable to the Board, after exhausting the administrative prerequisite of filing timely charges with the Office of Special Counsel. IRA complaints are limited to allegations of reprisal for whistleblowing activity, a prohibited personnel practice under 5 U.S.C. §2302(b)(8). *See Marren v. Department of Justice,* 51 MSPR 632 (1991), *aff'd,* 980 F.2d 745 (Fed. Cir. 1992) (unpublished).

Appellant is correct when she states that Petitions for Review may be filed on the basis that certain personnel actions may constitute prohibited personnel practices. 4 C.F.R. §28.2(b)(2). The Board holds, however, that the general provision of the regulations does not exempt an employee from meeting the requirements of the regulations in those matters otherwise appealable to the Board. In doing so, we have determined that requiring employees to meet the requirement of seeking reconsideration before petitioning the Board does not prejudice the right of the employee from having allegations of prohibited personnel practices considered; yet, it preserves the important purpose of allowing the Agency the opportunity to correct its mistakes.

The Initial Decision is supported by substantial evidence. The Appellant has failed to show that the Decision was inconsistent with law; an erroneous interpretation of statute or regulation; arbitrary, capricious or an abuse of discretion; or not consistent with required procedures resulting in harmful error.

IV. Conclusion

For the foregoing reasons, the decision of the Administrative Judge is AFFIRMED.

SO ORDERED.

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[8] Appellant cites to *Goines, supra,* and *Schaefer v. Department of Transportation*, 87 MSPR 37 (2000), as authorities in support of her argument that the MSPB may assume jurisdiction over denials of WIGIs as IRAs even when complainants had not sought reconsideration of the denials. The decisions in those cases do not make that determination, but do not reject the possibility.